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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1952

No. [redacted]62

GOLDEN H. OWENS AND LEON ANDERSON, *Petitioners*,

VERSUS

WILLIAM H. BANKS WAREHOUSES, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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GOLDEN H. OWENS AND LEON ANDERSON, *Petitioners,*

VERSUS

WILLIAM H. BANKS WAREHOUSES, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Golden H. Owens and Leon Anderson, respectfully petition this Honorable Court for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and respectfully show:

1.

Summary Statement of the Case

On July 2, 1947 Respondent appointed Petitioner Owens as the Custodian in a field warehousing scheme whereby

merchandise belonging to his employer was stored in space on the employer's premises and Respondent issued warehouse certificates representing such merchandise. In connection with such appointment such Petitioner executed the bond sued on binding himself to "well and faithfully perform his duties as such employee in every particular, and account to the above named obligee, as above provided, for all such goods, wares and merchandise and other commodities", and "pay over, reimburse and make good to the above named obligee all loss and damage which said obligee may sustain by reason of the failure, negligence, willful or otherwise, or refusal, or failure, for any cause, of said principal to do so". * * * Petitioner Anderson in his capacity as Acting Secretary of Mallory Canning Company, the owner of the warehoused merchandise, executed this bond as a Surety. Respondent asserts that said Petitioner executed same in his individual capacity also. (R. 1). After a loss resulted and this suit was filed, Petitioners defended upon the grounds that Respondent stored the warehoused merchandise upon the premises of the owner thereof, storing a portion in a building locked with Respondent's lock and delivered the key thereto to the owner of such merchandise instead of Petitioner Owens, and stored the remainder thereof in the plant of the owner which was open to the public during business hours, and with full knowledge that a part of the East wall of such structure was open and not closed and that the public had free access thereto at all hours. (R. 16, 17 and 27). They also defended on the ground that Respondent never did give Petitioner Owens any instructions as to the manner in which he should perform his duties. (R. 15 and 26). The Trial Court rendered judgment for Respondent non obstante veredicto. (R. 55). The Circuit Court affirmed (R. 362) and refused to grant a rehearing (R. 379).

2.

Jurisdiction

The date of the Judgment to be reviewed was March 11, 1953 (R. 362) and the Motion for Rehearing in that Court was dated April 8, 1953. (R. 379). This Honorable Court has jurisdiction because the Honorable Court of Appeals for the Fifth Circuit has decided an important question of local law in a way probably in conflict with the applicable local decisions, has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and has failed to give proper effect to an applicable decision of this Honorable Court (Supreme Court Rules 38, Sec. 5) and the jurisdiction of this Court is invoked under Sec. 1254 (1), Title 28, U. S. CODE.

3.

The Questions Presented

There are only two questions involved here now.

The first is whether the fact that Petitioner Owens has served a short time as such a Custodian during which time the owner of the merchandise was a partnership and before the appointment here involved, which was made upon incorporation of the same business, precluded the assertion of the defenses that possession of the keys was delivered to the owner of the merchandise and not the Custodian, that a portion of the merchandise was stored in a building one side of which was not closed with a wall and was open to the public, and that Respondent never instructed Petitioner Owens as to the manner in which he should perform his duties as Custodian, and that on account of these the loss was caused by the acts of Respondent.

The second is whether Petitioner Anderson was entitled

to go to the jury on his defense that he intended to sign the bond only as an acting corporate officer instead of individually, when he testified that such was his intention, and when Barry (Respondent's employee who procured his execution thereof, testified that he caused the corporate seal to be affixed to the identical signature upon which Respondent seeks to hold said Petitioner; and when the bond itself, in the body thereof, named him Anderson) "Leon Anderson, Sec. Treas." as the Surety, and said Barry (a witness for Respondent) told this Petitioner it was necessary for him to execute same "because he was secretary of the corporation" (R. 170); in other words, an inspection of the bond could not reveal the capacity in which this Petitioner signed, and the Jury was entitled to hear the testimony of the parties and decide this fact issue as they believed the facts to be.

4.

Reasons Relied on for Allowance of the Writ

It is a matter of common knowledge that field warehousing is a process which is vital to the economy of this Country, in that thereby manufacturers and processors who operate in a vicinity not adequately supplied with bonded warehouses are afforded an opportunity to secure warehouse receipts representing manufactured goods and offer these to banks as collateral for operating loans. Were such not true it would be necessary for them to have such a large capital structure to operate that the operation would be unprofitable. The banking code of Texas exempts loans thus secured from the loan limitations imposed upon Texas Banks. This fact alone discloses the importance of such to our economy. It is stated as a fact that the impact of the judgment here appealed from has disrupted many such plans. Banks in this vicinity have not taken the position that they

will not accept warehouse certificates such as were issued in this case as collateral, feeling that they had best pass up this business if the Courts will allow warehouse companies to handle their affairs in a slipshod manner, deny liability upon their outstanding certificates, and after litigation with the holder of the certificates, then engage in litigation with local people who have, with no thought of wrongdoing, become involved as are the Petitioners here. The facts are that the situation is of sufficient importance to the business world, and that means the entire citizenship of this Country, to justify the settling of a serious question by this Honorable Court.

The decision of the Court of Appeals in this case is in conflict with applicable local decisions, to-wit: EL PASO & S. W. RY. CO. v. EISCHEL & WEICHEL, 130 S.W. 922 at 940 (Tex. Civ. App.), error refused; DOCKERY v. DURHAM, 3 S.W. 2d 51 (Tex. Civ. App.), error dismissed; DODDS & WEINGARTEN, INC., v. REED, 69 S.W. 2d 165 (Tex. Civ. App.), error dismissed; and WALLACE v. TURBE, 84 S.W. 2d 254 (Tex. Civ. App.), no writ history, in the last of which cases the Court said:

> "It requires no citation of authority to support the conclusion that, if Nona Wallace's conduct caused appellees to fail to furnish the support contemplated by the contract, then Nona Wallace was not entitled to damages."

The decision of the Court of Appeals in this case is in conflict with the decision of another Court of Appeals on the same matter, to-wit: RICE v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, 103 Fed. 427, 43 C.C.A. 270; FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. UNITED STATES, 137 Fed. 866, 70 C.C.A. 204; and VANADIUM CORPORATION OF AMERICA v. FIDELITY AND DEPOSIT COMPANY

OF MARYLAND, 159 Fed. 2d 105, in the last of which cases the Court said:

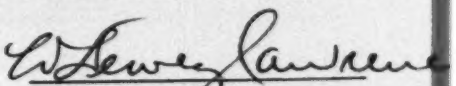
> " * * * 'wherever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied in fact that the cooperation will be given' * * * And plainly plaintiff was obligated to refrain from positive actions to prevent approval by the Secretary * * * Hence on the facts, as the jury could and did find for them, the Defendants' contractual duty herein was discharged by plaintiffs' breach of a condition precedent."

The decision of the Court of Appeals in this case fails to give proper effect to an applicable decision of this Honorable Court, and in fact conflicts with two of same, to-wit: UNITED STATES v. PECK, 102 U.S. 64, 26 L. Ed. 46, and PORTO RICO v. TITLE GUARANTY AND SURETY COMPANY, 227 U.S. 382, 57 L. Ed. 561, 33 S. Ct. 362, in the latter of which cases Mr. Justice Holmes said:

> "If within the time allowed for performance, the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform."

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Fifth Circuit at New Orleans, commanding that Court to certify and send to this Court for its review and determination, on a date certain therein to be named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket as No. 14,043, GOLDEN H. OWENS AND LEON ANDERSON, APPELLANTS, v. WILLIAM H. BANKS WAREHOUSES, INC., APPELLEE, that said judg-

ment of said Court may be reversed by this Honorable Court, and that Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for which Petitioners will ever pray.



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Supreme Court of the United States

OCTOBER TERM, 1952

No._____

GOLDEN H. OWENS AND LEON ANDERSON, *Petitioners.*

VERSUS

WILLIAM H. BANKS WAREHOUSES, INC., *Respondent*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

1.

The Opinion of the Court below

The memorandum opinion of the Trial Court has not been reported, but appears at page 61 of the Record. The opinion of the Court of Appeals appears on page 362 of the Record, and has not yet been reported.

2.

Jurisdiction

The basis upon which it is submitted that this Honorable Court has jurisdiction to review the judgment is set forth in Paragraph 2 of the Petition, which is adopted here.

3.

Statement of the Case

The Statement made in the Petition is here adopted and made a part of this Brief.

4.

Specifications of Error

1. The Honorable Court of Appeals erred in holding that Petitioner Owens' prior service as Custodian, during which he did not have possession of the keys to the warehoused merchandise stored in one building, and during which time a portion of the warehoused merchandise was stored in a building one side of which was not closed with a wall and was open to the Public, and during which he was never instructed by Respondent as to the manner in which it desired that he perform his duties, precluded him from asserting these things as a defense in this action, based upon the manner in which he performed his duties as such Custodian.

2. The Honorable Court of Appeals erred in holding that the testimony of Barry and of Petitioner Anderson was not sufficient to raise a jury issue as to the capacity in which Anderson executed the bond in suit.

5.

Argument, First Specification

It is stated categorically that the rule, announced in the Petition, that the obligee in a contract cannot have a recovery against the obligor for non performance when the obligee has impeded performance, is not questioned by the decisions of any Court in this jurisdiction. Respondent argues that the rule applies that a Surety cannot defend by saying to the injured party "You were negligent in not sooner discover-

ing the defalcation of the guilty employee" but such has no application to the facts at bar. At the outset, it is stated that no loss was occasioned by the Custodian Owens failing to correctly ascertain the amount of merchandise warehoused. Respondent's Assistant Secretary, C. Davenport, testified that all the merchandise covered by outstanding certificates was present on the premises when he made an inspection in September, 1947 (R. 26), and there were no further receipts issued after that time. This is the basis for the foregoing statement, because the only way the loss could have occurred, therefore, was in the manner in which merchandise went off the premises. It is this which impels Petitioners to say that the Honorable Court of Appeals erred in holding that the Custodian could not defend by showing that the keys to a part of the merchandise were delivered by Respondent to the owner of the merchandise instead of the Custodian, and that the remainder of the merchandise was stored in a building one side of which was not closed by a wall.

Attention is directed to the fact that Ida H. Kessler, Secretary of Respondent, testified that all mail addressed by Respondent to the Petitioner Owens was addressed "Golden Owens, Custodian, Mallory Canning Company, Grapeland, Texas" (R. 193 and 194). She testified that all mail to Owens was so addressed, including the letters containing his $10.00 monthly pay checks. Owens testified that all his contacts with Respondent were through W. F. Mallory, the President of Mallory Canning Company, the owner of the merchandise (R. 314) and that "the only mail I ever got from them was handed to me by Mr. Mallory (R. 320) and "all that I got was opened and some I got wasn't in envelopes" (R. 333).

Apparently the Honorable Court of Appeals substituted its thoughts for the thoughts of the jury for in no other way could it have affirmed the judgment non obstante vere-

dicto rendered by the Trial Court. It is submitted that the Honorable Court of Appeals had no power or right to disregard competent and undisputed testimony, offered in part by Respondent, especially when the law has been so ably announced by the same Court in TRAVELERS INSURANCE COMPANY v. WARRICK, 172 Fed. 2d 516 at 519:

> "It is not for this Court to determine the mental processes by which a verdict is arrived at, but only whether there was sufficient evidence to support the verdict. We are satisfied that the plaintiff made out a prima facie case. The Defendant rebutted, or attempted to rebut, the inference deducible from the facts shown by the plaintiff. Whether it succeeded or not was for the jury to decide."
>
> "It is not necessary that this Court concur in the facts as found by the jury, but merely to determine that a jury question was involved in a controversy of evidence, inferences, and presumptions as to the effect of which the minds of reasonable men might differ, and in the jury's solution of which we cannot say there was no substantial support."

Petitioners are not here attempting to argue a point of evidence. They are using this to illustrate their contention (respectfully submitted) that the Court of Appeals, because they might not have returned the same verdict as did the jury, have engrafted an exception upon the rule of law announced by this Honorable Court, and many others, as shown by the opinions cited in the Petition herein. That Honorable Court said, in effect "the obligee in a contract cannot impede performance by the obligor and then recover for non-performance, unless he can show that the obligor knew that he might impede performance when he made the contract".

It is respectfully submitted that the Honorable Court of Appeals erred in holding that Petitioner Owens' prior service

as custodian, under similar circumstances, precluded his claiming these circumstances as a defense in this action. Owens did not know what his duties and the desires of Respondent were, because Respondent addressed all his mail to him in care of the owner of the warehoused merchandise, and Petitioner Owens received only such of that mail as Mallory received, opened, and passed on to Owens.

6.

Argument, Second Specification

The bond sued upon names the parties thereto as "G. H. Owens, of Grapeland, Texas, as Principal, and Mallory Canning Co., Inc. of Grapeland, Texas, W. F. Mallory, Pres. of Grapeland, Texas, Esther Lee Mallory, V. P. Grapeland, Texas, and Leon Anderson, Sec.-Treas., of Grapeland, Texas, as Sureties" Petitioner Leon Anderson signed "Attest: Leon Anderson, Secretary". Said Petitioner also signed on the right hand side of the document "Leon Anderson" and Respondent's agent, Barry, caused the seal of the corporation to be affixed to both these signatures. Barry, as a witness for the Respondent, testified that he caused these seals to be affixed, and that "I had them all properly signed" (R. 152). Both Barry and Anderson testified that they believed that it was necessary for Anderson to sign, "because he was secretary of the corporation" (R. 170 and 289).

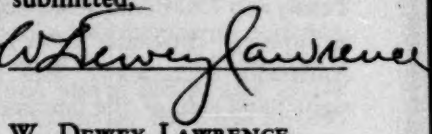
It is submitted that a reading of the bond, headed as stated above, and with the seal of the corporation affixed to the very signature upon which Anderson is being sued, will create a doubt in the mind of any reasonable man as to the capacity in which he thought he was signing. In this state of things, the parties to the transaction can, and must be called in to give their testimony. That was done, and it is submitted that the Trial Court has no right to set the jury finding aside,

and that the Honorable Court of Appeals had no right to hold that the testimony was not admissible. The Honorable Court of Appeals, in a prior decision, in HAWKINS v. FRICK-REID SUPPLY COMPANY, 154 Fed. 2d 88, said:

> "While the construction of a contract is ordinarily for the Court, if its terms are ambiguous and it becomes necessary to resort to extrinsic evidence to ascertain the intent of the parties, then the issue becomes one for the jury to decide as a question of fact."

WHEREFORE, it is respectfully submitted that this Honorable Court should grant the Writ of Certiorari, examine the questions presented, and reverse the decision of the Honorable Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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OCTOBER TERM, 1952

No. [redacted]62

GOLDEN H. OWENS and LEON ANDERSON,
Petitioners,

v.

WILLIAM H. BANKS WAREHOUSES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 785

GOLDEN H. OWENS and LEON ANDERSON,
Petitioners,

v.

WILLIAM H. BANKS WAREHOUSES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 61-75) has not been officially reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 361-367) is reported at *202 F. 2d 689.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition, except that Rule 38 (5) of the Rules of this Court does not give this Court jurisdiction, as the Petition attempts to state; the Rule only sets forth some of the criteria which this Court considers, in the exercise of its sound judicial discretion, when passing on petitions for certiorari.

QUESTION PRESENTED

Did petitioners introduce sufficient proof to justify submission of their affirmative defenses to the jury?

STATUTE INVOLVED

No statute, either State or Federal, is involved in this case.

STATEMENT

Respondent, William H. Banks Warehouses, Inc. (hereinafter referred to as "Banks") sued petitioner Golden Owens as principal and Mallory Canning Company, Inc., a corporation, W. F. Mallory, Esther Lee Mallory and petitioner Leon Anderson as sureties on an instrument designated as "Bond of Custodian and Transfer Agent"[1] to recover losses and expenses incurred by Banks because of Owens' breach of his bond. The pertinent portion of the bond reads as follows:

> "WHEREAS, the above bounded principal (Owens) has been employed by the above named obligee

[1]No copy of this bond being included in the record submitted to this Court, it is reproduced for the Court's convenience in the Appendix hereto.

(Banks), and, such employee, will from time to time, be intrusted with the responsibility of ascertaining and correctly certifying as to the actual receipt of certain merchandise as specified on Applications for Warehouse Receipts or reports and will be placed in possession, charge or custody of goods, wares, merchandise and other commodities, belonging to, or stored with, said above named obligee at Grapeland, Texas, or elsewhere, for account of Mallory Canning Company, Inc., and for the possession of which said above named principal will be responsible.

"NOW, THEREFORE, if the above named principal shall well and faithfully perform his duties as such employee in every particular, and account to the above named obligee, as above provided, for all such goods, wares, merchandise and other commodities, and shall pay over, reimburse and make good to the above named obligee all loss and damage which said obligee may sustain by reason of the failure, negligence, willful or otherwise, or refusal, or failure, from any cause, of said principal so to do, then this obligation to be null and void; otherwise to be and remain in full force and effect."

The bond was executed in connection with a field warehousing service which Banks was operating for Owens' employer, Mallory Canning Company. The nature of this field warehousing is well described in the District Court's opinion (R. 62-63), adopted by the Court of Appeals (R. 362). At the close of the evidence, Banks moved for a directed verdict in its favor against all defendants (R. 31-34). The District Court held Banks had proved a prima facie case against all defendants and directed a verdict in Banks' favor against Mallory Canning Company, W. F. Mallory and Esther Lee Mallory, as sureties on the bond.

No error is assigned here with regard to this ruling and none was assigned in the Court of Appeals.

The District Judge submitted the case to the jury, however, on two affirmative defenses: (1) as to both Owens and Anderson, the claimed defense that certain acts or omissions of Banks were negligent and these acts prevented Owens from performing his duties as custodian and were the cause of the loss; and (2) as to Anderson alone, the claimed defense that he signed the bond as an officer of Mallory Canning Company only and not individually. The jury found for both defendants. Banks then filed a motion (R. 51-54) under Rule 50 (b) Rules of Civil Procedure for United States District Courts asking that the verdict and judgment be set aside. Upon careful consideration of the entire record (R. 61-75), the District Court found there was no evidence to support the verdict, granted the motion and entered judgment in Banks' favor (R. 55-57). The Court of Appeals affirmed (R. 367), also after a careful review of the record (R. 361-367), and denied a petition for rehearing (R. 376).

Both Courts stated the evidence showed conclusively that Owens made not the simplest pretense to perform his duties as custodian (R. 71, 364). The trial judge so charged the jury (R. 36, 40, 43). Owens had been a field warehouse custodian since February, 1946, 16 months before signing the bond in question, and the new bond was required only because the Mallory Canning Company had, in the interim, changed from a partnership to a corporation (R. 85-94). While the evidence did not specifically show what caused

the shortages, the District Court held the only possible inference was that the shortages were caused by Owens' failure to perform his duties (R. 70-71). The Trial Judge also charged the jury that without question the bond was breached because a loss of some $40,000 had occurred (R. 40).

ARGUMENT

I.

Where two lower courts, after careful study of the entire record, find there were no facts to justify a jury verdict in petitioners' favor on their affirmative defenses, this Court should not again review the same record.

It should again be emphasized that the District Court ruled that Banks, the plaintiff-respondent, had proved a prima facie case and no error has been assigned to this ruling. The only question submitted to the jury was whether the petitioners had proved their affirmative defenses. Whether or not there was sufficient evidence to justify the jury's verdict on this question requires a careful study of the entire record of the trial. First the District Court and then the Court of Appeals made such a study and both concluded, as stated by the Court of Appeals, that:

> "The foundation of a fact issue sufficient to uphold the verdict of the jury is not here present." (R. 367.)

This Court should not be asked to again perform the same job.

II.

The decisions below are correct.

It would be utterly inconsistent to direct a verdict against a surety as the trial court did against three of the four sureties (R. 36, 48) and at the same time find the principal (Owens) has a valid defense. Furthermore, the evidence completely fails to disclose such a defense. There is no question that Owens utterly failed to perform the conditions of his bond (R. 71, 364, 36, 40, 43). It is also conceded that Banks suffered a loss because a substantial quantity of goods was missing from the warehouse (R. 17-19, 40, 246-247, 353-354). As the District Court pointed out, the only possible inference was that Owens' failure to perform caused the loss (R. 71). Owens claims he was prevented from proper performance because: (1) part of the warehouse was not enclosed; (2) he never received instructions; and (3) W. F. Mallory kept the keys to the warehouse. Owens had been a custodian for 16 months before signing the bond in question (R. 314-315) and he and his sureties were fully cognizant of the condition of the warehouse (R. 313-314; 300-303; 121-122, 270-271). Where a condition known to the parties exists at the time a contract is entered into, it cannot serve as an excuse for nonperformance. *Aubry v. Lewis (Tex. Civ. App., 1929), 19 S. W. 2d 87; Levy Plumbing Co. v. Standard Sanitary Mfg. Co. (Tex. Civ. App., 1933), 68 S. W. 2d 273; R. E. Taylor Syndicate v. James (Tex. Civ. App., 1922), 243 S. W. 1105; Masterson v. Amarillo Oil Co. (Tex. Civ. App., 1923), 253 S. W. 908, 912.*

As to the claim with regard to the instructions, the evidence shows they were addressed to Owens at Mallory Canning Company. If W. F. Mallory, a partner in and then the President of that Company and a surety on the bond, opened the letter and kept the instructions instead of giving them to Owens, Banks is not responsible, nor would Mallory's wrongful acts relieve Owens and Anderson of their duties to Banks. Furthermore, Owens' duties are clearly spelled out in the bond, whether or not he received the supplementary instructions.

Owens admits having possession of the keys to the warehouse (R.....). His delivery of the keys to Mallory is the result of his own negligence or his deference to Mallory's wishes. Neither alternative relieves him or his sureties of their duties to Banks. Interference of a third party with performance of a contract by a third party does not relieve contracting parties of their obligations. *17 C. J. S. Contracts*, § *468(a)*, *p. 967*. *A fortiori*, interference by a surety with the principal's performance cannot excuse the responsibility of each to the obligee.

In any event, mere negligence on the part of an obligee does not prevent his recovery on a surety bond. *Minor v. Mechanic's Bank, 1 Pet. 36 at 71 (1828); Fidelity and Deposit Company v. Courtney, 186 U. S. 342, 364 (1901); First State Bank v. Metropolitan Casualty Ins. Co. (Tex., 1935), 79 S. W. 2d 835; Williams v. Lyman (C. C. A. 8, 1897), 88 F. 237.* In addition, petitioners cite no evidence that the losses in question were in any way caused by the

alleged negligence of Banks—and there is no such evidence in the record.

With regard to Anderson's alleged defense that he signed the bond only in an official not in an individual capacity, both lower Courts carefully examined the bond and determined that it was not ambiguous on its face and that taken as a whole it was susceptible to only one construction —that Anderson was bound in his individual capacity. This decision was correct under Texas law and the law of other jurisdictions. *Marx v. Luling Coop. Assn. (Tex. Civ. App., 1897), 43 S. W. 569 (Writ of Error refused); First State Bank of Denton v. Smoot-Curtis Co. (Tex. Civ. App., 1938), 121 S. W. 2d 667; Costello v. Bridges (Wash., 1914), 142 Pac. 687, 691; Kessel v. Murray (Iowa, 1924), 196 N. W. 591, 593-594; Bank of Corning v. Nimnich (Ark., 1916), 183 S. W. 756; Saunders v. Columbus Life & Gen. Ins. Co., 43 Miss. 583; DeBebian v. Gola (Md., 1885), 21 Atl. 275; Dutton v. Marsh, L. R. 6, Q. B. 361, 4 English Ruling Cases 278.*

III.

There is no conflict with local law, with decisions of other Courts of Appeals or with decisions of this Court.

Petitioners point to no decision of local or federal courts which is directly in conflict with the instant case on the same or similar facts. None of the cases with which the present decision is alleged to conflict (Petition, pp. 5-6) involve facts similar to the case at bar. These cases, or most

of them, were presented to both lower courts. As the District Court said: "Of course, no case is directly in point" (R. 68). In general, these decisions assert the proposition, that when one party to a contract, by affirming act or by failure to perform an act which he expressly or impliedly promised to perform, prevents performance by another party, the party thus preventing performance cannot profit by the other's failure to perform. This principle was recognized by both lower courts (R. 67, 70, 365). But both Courts found the facts proved by petitioners in the present case did not come within that principle. Such a decision cannot present a "conflict" with local law or among federal courts of the type this Court should be called upon to resolve.

IV.

No important problems of law or fact are involved in this case.

The present suit is a simple action on a performance bond. No Federal or State statutes are involved. No constitutional issues are urged. No questions of Federal procedure or rules appear. Any decision this Court might make would be limited in scope and effect to the particular and peculiar facts here involved. The attempt of petitioners to raise the present case to one of importance simply because field warehousing is involved (Petition, pp. 4-5) and the flat statement that the decision threatens the industry, are the naked assertions of counsel, completely unsupported by any facts in the record or any facts of which this Court may take judicial notice. As such, these statements are

entitled to no consideration whatsoever. Furthermore, the issues in this case do not even involve field warehousing, as such. They concern problems of suretyship law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

"KNOW ALL MEN BY THESE PRESENTS, that I, G. H. OWENS of Grapeland, Texas, as principal, and Mallory Canning Co., Inc., of Grapeland, Texas, W. F. Mallory, Pres., Grapeland, Texas, Esther Lee Mallory, VP, Grapeland, Texas, and Leon Anderson, Sec.-Treas., of Grapeland, Texas, as sureties, are held firmly bound unto WILLIAM H. BANKS WAREHOUSES, Inc., a Corporation organized and existing under the laws of the State of Illinois and duly licensed to do business in the State of Texas, operating as a Field Warehouseman and having principal offices at 209 South La Salle Street, in the City of Chicago, State of Illinois, in the penal sum of $50,000.00, good and lawful money of the United States of America, well and truly to be paid and for the payment of which we, and each of us, hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

"Dated at Grapeland, Texas, this 2nd day of July A. D., 1947.

"WHEREAS, the above bounden principal has been employed by the above named obligee, and, such employee, will from time to time, be intrusted with the responsibility of ascertaining and correctly certifying as to the actual receipt of certain merchandise as specified on Applications for Warehouse Receipts or reports and will be placed in possession, charge or custody of goods, wares, merchandise and other commodities belonging to, or stored with, said above named obligee at Grapeland, Texas, or elsewhere, for account of Mallory Canning Company, Inc., and for the possession of which said above named principal will be responsible.

"NOW, THEREFORE, if the above named principal shall well and faithfully perform his duties as such employee in every particular, and account to the above named obligee, as above provided, for all such goods,

wares, merchandise and other commodities, and shall pay over, reimburse and make good to the above named obligee all loss and damage which said obligee may sustain by reason of the failure, negligence, willful or otherwise, or refusal, or failure, from any cause, of said principal so to do, then this obligation to be null and void; otherwise to be and remain in full force and effect.

(SEAL)

"/s/ G. H. Owens (SEAL)
Principal

"/s/ Mallory Canning Co., Inc. (SEAL)

"By /s/ W. F. Mallory (SEAL)
President

"Attest: Leon Anderson
Secretary

"/s/ W. F. MALLORY (SEAL)

"/s/ Leon Anderson (SEAL)

"/s/ Esther Lee Mallory (SEAL)"